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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

YOKNAPATAWPHA DRAINAGE DISTRICT NO. 2, LAFAYETTE COUNTY, MISSISSIPPI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

NO. 486

PETITION FOR WRIT OF CERTIORARI

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RESPONDENT.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

JURISDICTIONAL STATEMENT

The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Judiciary and Judicial Procedure, Sections 1254, 1345 and 2101, together with Rule 19(b) of this Court.

Time for applying for certiorari to Supreme Court of the United States begins from the date of the overruling of motion for rehearing. *Gypsy Oil Co. v. Escoe,* 274 U.S. 498, 72 L.Ed. 393; *U. S. v. Seminole Nation,* 299 U.S. 417, 81 L.Ed. 316; *Department of Banking,*

State of Nebraska v. Pink, 317 U.S. 264, 87 L.Ed. 254, rehearing denied, 318 U.S. 802, 87 L.Ed. 1166; *U.S. v. Ellicott*, 223 U.S. 524, 56 L.Ed. 535; *Kingman & Co. v. Western Mfg. Co.*, 170 U.S. 675, 42 L.Ed. 1192; *Aspen Mining & Smelting Co. v. Billups*, 150 U.S. 31, 37 L.Ed. 986; *Morse v. U.S.*, 270 U.S. 151, 70 L.Ed. 518.

Summary Statement of Matters Involved

Petitioner, Yoknapatawpha Drainage District No. 2, Lafayette County, Mississippi, by its counsel, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals, Fifth Circuit, rendered April 2, 1957, affirming an order of the District Court of the United States for the Northern District of Mississippi, in favor of petitioner, and also, from an order of said United States Court of Appeals overruling the petition of said Drainage District for rehearing, which order is dated May 23, 1957.

On January 5, 1952, the United States of America filed its Declaration of Taking in the United States District Court for the Northern District of Mississippi, seeking to condemn certain land, drainage canal and right-of-way of petitioner (Tr. 2-7), together with Complaint for same purpose (Tr. 7-13).

Judgment on this Declaration of Taking was entered on January 22, 1952 (Tr. 13-15).

So far as concerns the Petitioner, this condemnation case was continued from time to time. On December 4, 1953, Petitioner filed its answer (Tr. 16-49).

This answer set up the organization on July 25, 1916, of the above Drainage District under the laws of Mis-

sissippi of 1912, Chapter 197, with the corporate name above set out and was a municipal and public corporation; that at all times since the date of its creation said Drainage District has functioned and is still functioning as a drainage district; that the governing authority of said Drainage District is the County Board of Drainage Commissioners of Lafayette County, Mississippi; that subject to the date of its creation the said District adopted and put through a plan for the reclamation and drainage of the land located within its boundaries; that a drainage system was constructed in said District according to the aforesaid plans, at a total of Fifty-eight Thousand, Eight hundred and sixty and 48/100 Dollars ($58,860.48); that thereafter the County Board of Drainage Commissioners, the governing body of said District, proceeded to assess the lands and property located in said District as required by law, with the benefits to accrue thereto by reason of the improvements to be made in said District; this assessment of benefits and damages accrued to said lands by reason of the drainage improvement and was completed in all respects as provided by law; that this assessment of benefits and damages then and there became final and became a lien upon all the land within the territory of said Drainage District.

It further set up that the total amount of said assessed benefits was in the sum of One Hundred and forty-seven Thousand, One Hundred and fifty-one Dollars ($147,151.00); that no appeal was prosecuted from the final order approving said assessed benefits and that the District acquired rights-of-way as shown on said maps and the right to construct canals and ditches on same.

It further set up that bonds were duly legally issued by said District but that all the bonds have been paid

except two small bonds which are now outstanding and which have not been presented for payment.

The Answer then set up that The United States of America was seeking to condemn part of the property of said District and part of its canal and drainage works; that all of said land had not been taken by The United States and that there remained untaken in said District a total of 1973.5 acres of land; that for such lands the Drainage District was under obligation, and will continue to be under obligation, to furnish drainage protection (Tr. 18-19).

The Answer further set up that the Drainage District still maintains this drainage canal; that in order to do so properly it is necessary from time to time to repair said canal and that it will be necessary from time to time in the future to repair said canal so as properly to drain the land in said Drainage District which has not been taken by The United States; that the said Drainage District is vested by law with the authority, and charged with the obligation, to continue in the future to maintain said drainage system in order to furnish proper drainage for that part of the land in the District which has not been taken by The United States (Tr. 19-20).

It further set up that the lands in the District had been assessed for taxes on said assessed benefits and damages for the year 1917 and for all succeeding years up to year 1940; that said Drainage District still has the power, and the obligation, to assess said land for necessary repairs and maintenance of said drainage system, and will have such power and obligation until said Drainage District is dissolved; that the proceeds of such annual assessments for former years were used

by said Drainage District for the purposes specified by Chapter 197 of the Laws of Mississippi of 1912; which purposes were, and are, construction, operation and maintenance of said drainage system (Tr. 20).

That the lands described in said Complaints filed by The United States of America are, and have been, within the territorial limits of said Drainage District at all times since said Drainage District was organized; that said lands, and the lands not taken by the United States, have received, are still receiving, and will continue in the future to receive full benefits from the operation and maintenance of said drainage system; that without such benefits said lands not taken by The United States will deteriorate greatly in value and utility and would be worthless for any beneficial uses (Tr. 20-21).

That The United States has taken for the purpose of the Enid Reservoir a total of 4115.6 acres of the lands of said Drainage District and will flood said land so taken; that such action will require increased work in maintenance and expense to prevent the lands of said Drainage District not taken by The United States from being flooded and made useless; that to prevent such an occurrence it will be necessary for such Drainage District to levy additional taxes upon the assessed benefits previously assessed against all the lands in said Drainage District, including the lands taken by The United States; that the amount of unused assessed benefits on all the lands in said Drainage District is Thirty-three Thousand, One Hundred Nine and 05/100 Dollars ($33,109.05); that such assessed benefits, when they were finally approvided, became a lien upon all the lands in the District and are still a lien upon all the lands in the District (Tr. 21).

That said Drainage District is authorized by virtue of Chapter 197 of the Laws of Mississippi of 1912 to make yearly levy of taxes upon such assessed benefits in order to carry out the purposes for which said Drainage District was organized and for which said drainage system was constructed.

That by virtue of Chapter 197 of the Laws of Mississippi of 1912 said Drainage District acquired, long prior to the commencement of this suit, and now owns, an indefeasible estate and interest in all the lands within said Drainage District, including the lands which have been taken by The United States; that the full fee simple title to said lands has been, is, and will continue to be in the future, subject to such indefeasible estate and interest and lien; that the estate, interest and lien of said District in said lands is property for which said Drainage District is entitled to compensation from the United States and that the United States took the said lands in said Drainage District, and acquired the fee simple title thereto, with full knowledge of, and subject to, the indefeasible estate and lien of said Drainage District in said lands so taken (Tr. 22).

That the Court has refused, in many specific instances, to charge the owners of the various tracts taken by The United States in said District with any unused assessed benefits and that if said District is not compensated by The United States for the cost of the construction and maintenance of its drainage system, then its indefeasible estate in all the lands in said Drainage District will be taken from it by The United States without compensation and in violation of Article XIV of the Constitution of the United States without due process of law, and that said Drainage District will be denied equal pro-

tection of the law in violation of Article XIV of the Constitution of The United States (Tr. 22).

That said District has the power, and the obligation, in the future, to levy taxes, based upon the unused assessed benefits pertaining to all the lands in said District, for the repair and maintainence of said drainage system in order to protect the lands in said District which have not been taken by the United States (Tr. 22).

That for the destruction of said drainage system in said District and for the deprivation of the right to levy taxes upon the unused assessed benefits on all the lands in said District taken by the United States and for the deprivation and destruction of its indefeasible estate in all the lands in said District, said District will be damaged in the sum of many thousands of dollars, and that if payment therefore is not made said District will be deprived of its property without due process of law under Article XIV of the Constitution of the United States (Tr. 23).

The Answer then denied that the compensation deposited by The United States was anything like the value of the property taken by The United States and alleged that the unused assessed benefits above set forth became a lien on all the land in this District at the time the roll of the assessed benefits and damages was made final, and that if said District should be precluded from using said unused assessed benefits on all the land in the District, including the lands in said District taken by The United States, said District would thus be deprived of its property without due process of law and would be denied the equal protection of the laws in violation of

Article XIV of the Constitution of The United States. (Tr. 23).

That because of the taking and flooding of the lands in said District which have been taken by The United States, the flow of water in the drainage canal through the lands of the District not taken will be greatly retarded, and to prevent flooding of the lands within the District not taken by The United States it will be necessary for said District, and would be the obligation placed by law upon said District, for said District to reconstruct almost completely said canal at a cost which would far exceed the present unused benefits available to the District on all the land in said District and would require an additional future assessment of damages and benefits on all the land in said District, including such lands in said District as have been taken by The United States; that said District has the right, and is under the obligation, under the law to make such assessments as might be necessary to accomplish such purpose, and such right and such obligation extend to all the lands within the boundaries of said District, including the land in said District now owned by The United States in fee simple; that if said District should be deprived of such property right, the property of said District would thus be taken without due process of law and said District would thus be deprived of equal protection of the law, all in violation of Article XIV of the Constitution of The United States (Tr. 23-24).

That said District should be paid an amount in excess of the amount deposited by The United States in the Registry of the Court for the taking of the property of said Defendant; that in addition to that said District was entitled to be paid unused assessed benefits in the

amount of $33,109.05; that said District should also be paid for the value of all land in the District taken by The United States, free from the lien of said assessment, or, in the alternative, it should be decreed that The United States accept fee simple title to said land in said District so taken by The United States subject to all future assessments that might become necessary in order for said District to fulfill the functions required of it by law (Tr. 24).

On June 15, 1955, The United States filed an Amended Motion to strike the Answer of Petitioner with the exception of the claim for just compensation for the taking of right-of-way and canal, and set up the following grounds:

1. That the unused assessed benefits were not specific liens against the land within the scope of the Laws of Mississippi of 1912, Chapter 197.

2. That assessments against the property to pay for improvements for all practical purposes are taxes and that the property of The United States cannot be taxed by a state or any of its subdivisions unless consent is given and no such consent had been given.

3. That the right to tax or levy an assessment is not a property right.

4. That the District does not own an indefeasible estate in any lands within the District.

5. That the lands of The United States will not be benefitted by the continued operation of the Drainage District.

6. That there is no violation of the Constitution of The United States, Article XIV.

7. That the assessments of the District do not become liens upon all of the lands of the District.

8. That the District is under no obligation to furnish drainage for the lands owned by The United States.

9. That the District has no power nor right to assess lands owned by The United States.

10. That the District does not own an indefeasible estate in and to any lands of The United States, as such lands were taken free and clear of all encumbrances and are therefore not subject to any interest or liens.

11. That The United States did not destroy the Drainage District.

12. That the District owns no land within its boundary.

13. That said District is not entitled to any compensation for the unused assessed benefits not levied. (Tr. 52, 53).

On June 21, 1955, the District Court sustained this motion except as to the claim of said Drainage District for compensation for the canal and the land of the District taken by The United States, stating that the District had placed no specific lien upon any of this land up to this time and that there was no specific lien on any of the land in said Drainage District because of any unused assessed benefits. (Tr. 53, 54).

To this Order the Drainage District excepted (Tr. 53-54).

On June 16, 1956, this case came on for trial. (Tr. 55). The testimony in this case is shown in the record (Tr. 55-56).

The purpose of the line of questioning by counsel for Petitioner is also shown (Tr. 66-67).

The instructions of the lower Court to the jury stated that the Drainage District could recover nothing but nominal value (Tr. 71-72).

The jury returned a verdict giving said Drainage District $1400.00 (Tr. 73). A copy of such verdict is attached as Appendix No. 1.

On June 19, 1955, the District Court entered judgment on the above verdict, awarding the Drainage District $1400.00 (Tr. 74-76). A copy of this final judgment is attached as Appendix No. 2.

On June 25, 1956, Notice of Appeal was given (Tr. 76).

The case was appealed to the Court of Appeals, Fifth Circuit, and the judgment of the District Court was affirmed. 242 F.2d 925. This Court held that the Drainage District had placed no specific lien on any of the land in the District up to this time and that there was no specific lien on any of the land in said Drainage District because of any unused assessed benefits.

It further held that there was no provision in Laws of Mississippi, 1912, Chapter 197, for the assessment of benefits accruing to all lands within the District or that such assessments should constitute a lien. It held that there was nothing in the cases cited by Petitioner that

conflicted with such construction of the Mississippi law and that the United States was exempt from such assessments as had been levied by the Drainage District.

A copy of the Opinion of the United States Court of Appeals of the Fifth Circuit in this case is made Appendix No. 3 hereto.

Petitioner filed a petition for rehearing, which was granted, and a copy of said Order is attached as Appendix No. 4 hereto.

Upon reconsideration of the case the Court of Appeals adhered to its former opinion, a copy of which Order is hereby made Appendix No. 5 hereto.

The judgment of the United States Court of Appeals, Fifth Circuit, affirming the judgment of the District Court of the United States for the Northern District of Mississippi, will be found in Transcript 83.

QUESTIONS PRESENTED.

The questions presented are as follows:

1. As to whether or not Petitioner ever placed a specific lien on any of the land in this Drainage District, and whether or not there was a specific lien on such land because of any unused assessed benefits.

2. As to whether or not it was error for the District Court of the United States for the Northern District of Mississippi to strike that part of the Answer of Petitioner which claimed an indefeasible interest and estate in all of the land in said Drainage District.

3. As to whether or not The United States took part of said drainage canal and right-of-way free from all encumbrances.

4. As to whether or not Petitioner had the power to make an additional assessment of benefits and damages on the land in the Drainage District if such should become necessary in the future for the proper repairs and maintenance of the drainage canal in order to furnish proper drainage for that part of the land in the drainage district which was not taken by The United States.

5. As to whether or not the District Court used the correct measure of damages in awarding compensation to Petitioner, and as to whether or not Petitioner has been allowed just compensation for the taking of part of its drainage canal and right-of-way.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Reason I:

The Drainage District did place a specific lien on all the land in the District back in 1917 when this assessment of benefits and damages became final. Otherwise the Drainage District would have had no basis upon which it could have had taxes levied between 1917 and 1940, because the construction of the canal had long been finished before 1920. Such lien, once established, persists until such unused assessed benefits have all been exhausted or until the Drainage District has been dissolved, and such assessed benefits have the force of a final judgment, according to the law of Mississippi.

Laws of Mississippi 1912, *Chapter* 197, *Section* 24, Appendix 6; *Laws of Mississippi* 1912, *Chapter* 197, *Section* 25, Appendix 7; *Laws of Mississippi* 1912, *Chapter* 197, *Section* 34, Appendix 8; *Laws of Mississippi* 1912, *Chapter* 197, *Section* 46, Appendix 9; *Laws of Mississippi* 1912, *Chapter* 197, *Section* 54, Appendix 10.

Gillis vs. Indian Creek Drainage Dist., (1929), 155 Miss. 160, 166, 167, 124 So. 262; *Gillis vs. Indian Creek Drainage Dist.* (1931), 160 Miss. 528, 536, 134 So. 173; *Willis Creek Dr. Dist. vs. Yazoo County*, (1950), 209 Miss. 849, 48 So.2d 498, 501; *Howie vs. Panola-Quitman Dr. Dist. et al*, (1933), 168 Miss. 387, 398, 399, 151 So. 154.

Reason II:

The Drainage District did have an indefeasible estate and interest in all the land in the District under the decisions of a Federal Court, which decisions have never been overruled.

U. S. vs. Aho et al, (D.C.Ore. 1944), 68 F.Supp. 358; *U. S. vs. Florea et al*, (D.C.Ore. 1945), 68 F.Supp. 367.

Reason III:

The United States did not take such land in the Drainage District free from all encumbrances. It took the fee simple title all right to about two-thirds of the land in the Drainage District, but it took such land subject to the lien of the assessed benefits, which taking was analogous to taking land subject to a recorded mortgage. The lien of these assessed benefits was on the land and was the property of the Drainage District and not the property of the land owners whose property was taken.

Since the law of Mississippi states that such assessed benefits are a lien which has the force and effect of a judgment, then to permit The United States to take such land and not pay such judgment is to nullify a solemn judgment of a state.

A county could not do so, nor could the State of Mississippi.

Howie vs. Panola-Quitman Dr. Dist. et al, (1933), 168 Miss. 387, 396, 397, 399, 151 So. 154.

Reason IV:

Petitioner originally had the power to make an additional assessment of benefits and damages on all the land in the Drainage District if such should become necessary for the proper repair and maintenance of the drainage canal, and it still has such power in such circumstances in order to furnish proper drainage for that part of the land in the Drainage District which land has not been taken by The United States.

If this were not true then, when the unused assessed benefits have been exhausted, the Drainage District would founder because it would have no source of funds to maintain its drainage canal. The Drainage District is required by law to repair and maintain this canal in order to furnish proper drainage for the land in the Drainage District. This obligation is put upon the Drainage District by law.

Laws of Mississippi 1912, *Chapter* 197, *Section* 34, Appendix No. 8.

Furthermore, the Supreme Court of Mississippi has

said that this is the obligation of the District and that the District has the power to make up a new roll of additional assessed benefits and damages for such purpose if that should become necessary.

Simmons vs. Hopson's Bayou Drainage Dist., (1916), 112 Miss. 200, 207, 72 So. 901; *White et al vs. Lake Cormorant Drainage Dist.*, (1922), 130 Miss. 351, 94 So. 235; *Anderson vs. McKee et al*, (1938), 182 Miss. 156, 179 So. 858, 860; *People's Bank Liquidating Corp. vs. Beashea Dr. Dist.*, (1946), 199 Miss. 505, 24 So.2d 784, 788; *Buchanan vs. Red Banks Creek Dr. Dist.*, (1949), 205 Miss. 736, 39 So.2d 321, 322.

Reason V;

The District Court did not use the correct measure of damages in awarding compensation to Petitioner and Petitioner has not received just compensation for the taking of part of its drainage canal and right-of-way.

The Drainage District is required by law to repair and maintain this canal in order to furnish proper drainage for the land in the Drainage District not taken by The United States.

This taking was the taking of a part of an integrated drainage system and Petitioner was entitled to prove the reasonable estimated cost necessary for repairing and maintaining the drainage canal in order to furnish drainage for the lands in that part of the District which had not been taken by The United States.

U.S.A. vs. Town of Nahant, (1907), 153 F. 520, 82 C.C.A. 470; *U. S. vs. Wheeler Tp.*, (C.C.A. 8th 1933), 66 F.2d 977, 985; *U. S. A. vs. Des Moines County, Iowa*

et al, (C.C.A.8th 1945), 148 F.2d 448, 449; *U. S. vs. State of Arkansas et al,* (C.C.A. 8th 1947), 104 F.2d 943, 944; *City of Fort Worth, Tex. vs. U.S.A.,* (C.C.A. 5th 1951), 188 F.2d 217, 222, 223.

Reason VI: And for other reasons appearing to be assigned at the hearing.

Petitioner attaches to this Petition a certified copy of the Transcript of the Record of the United States Court of Appeals, Fifth Circuit, and, upon a presentation of the Petition, will furnish ten (10) copies of such Record as printed in the United States Court of Appeals, Fifth Circuit, with proceedings and opinions in that Court.

WHEREFORE, Petitioner prays for a Writ of Certiorari from this Honorable Court directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day named therein, a full and complete transcript of the Record and all of the proceedings in the case of Yoknapatawpha Drainage District No. 2, Lafayette County, Mississippi, vs. United States, No. 16283 on the docket of said Court, and that the judgment of said Court of Appeals may be reversed and the judgment of the United States District Court for the Northern District of Mississippi may be reversed, and Petitioner afforded appropriate relief.

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COUNSEL FOR PETITIONER

APPENDIX 1.

Jury Verdict

Tract No. 457—Yoknapatawpha Drainage District.

We, the Jury, find that the just compensation for the taking of that portion of the drainage ditch belonging to Yoknapatawpha Drainage District No. 2, Lafayette County, Mississippi, designated as Tract No. 457 (a strip of land containing in the aggregate of 126.5 acres, more or less), was on the date of taking, January 5, 1952 . . . $1400.00.

(Signed):

APPENDIX 2.

Final Judgment, United States District Court, Tract No. 457.

This cause came on for hearing for a judgment confirming the award of the Jury and fixing just compensation for the taking of Tract No. 457 of the above proceeding;

And it appears that on Jan. 5, 1952 a declaration of taking and a complaint were filed in this cause, and that there was deposited in the Registry of the court concurrently with the filing of the declaration of taking the sum of $1,265.00, being the estimated compensation for the taking of Tract No. 457 of the above-entitled proceeding;

And it further appears that all persons, firms, partnerships and corporations who may have or claim to have any right, interest, title or estate in Tract No. 457 have been made parties defendant in said cause, and that each and every one of the parties defendant has been duly

served with process in the manner and form as required by law;

And it further appears that the only question involved in this proceeding at this time is the fixing of just compensation for the taking of Tract No. 457;

And it further appears that a Jury was empaneled at the regular June 1956 term of court for said District, consisting of Marshall W. Bowden, Jr. and eleven others who were duly qualified, accepted and sworn to try the issue and determine the amount of just compensation for the taking of Tract No. 457;

And it further appears that the jury after hearing the testimony offered by the plaintiff and the instructions of the court as to the awarding of a nominal value for the taking of Tract No. 457, returned into open court the following verdict to-wit:

> "We, the Jury, find that the just compensation for the taking of that portion of the drainage ditch belonging to Yoknapatawpha Drainage District No. 2, Lafayette County, Mississippi, designated as Tract No. 457 (a strip of land containing in the aggregate of 126.5 acres, more or less), was on the date of taking, January 5, 1952 . . . $1400.00."

And thereupon the verdict of the jury was received and entered by said court as just compensation for the taking of Tract No. 457.

And it further appears that a deficiency judgment in the amount of $135.00, together with interest at the rate of six percent per annum from January 5, 1952, until same is deposited in the Registry of the court, should be entered in this cause;

IT IS THEREFORE ORDERED That the jury verdict now on file in this cause is hereby ratified, confirmed and approved.

IT IS FURTHER ORDERED That the sum of $1400.00 is hereby fixed as just compensation for the taking of Tract No. 457. Said tract being briefly described as follows:

> A strip of land 150 feet in width lying and being situated in the W½ of section 2, the S½ of section 3, the S½ of section 8, the central part of section 9, the NW¼ of section 10, the NW¼ of section 17, the central part of section 18, township 10 south, range 4 west, and in the SE¼ of section 13, the SE¼ of section 23, and the northwest part of section 24, township 10 south, range 5 west, in Lafayette County, Mississippi, containing in the aggregate 126.5 acres, more or less, of which 10.3 acres are in section 2, 14.7 acres in section 3, 15.3 acres are in section 8, 19.8 acres are in section 9, 6.7 acres are in section 10, 4.2 acres are in section 17, 21.2 acres are in section 18, 11.5 acres are in section 13, 7.3 acres are in section 23, and 15.5 acres are in section 24.

IT IS FURTHER ORDERED That the deficiency in the amount of $135.00, together with interest at the rate of six percent per annum from January 5, 1952, until same is deposited in the Registry of the court is hereby directed to be deposited in the Registry of the court;

IT IS FURTHER ORDERED That this is a final judgment as to the fixing of just compensation for the Taking of Tract No. 457 of the above proceeding.

This the 19th day of June, 1956.

/ss/ Allen Cox
District Judge

Entered in Civil Order Book Pages

APPENDIX 3.
Opinion, United States Court of Appeals for the Fifth Circuit April 2, 1947.

Appeal from the United States District Court for the Northern District of Mississippi.

(April 2, 1957.)

Before BORAH, TUTTLE and CAMERON, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a judgment based on a jury verdict in favor of appellant in a land condemnation action in which appellant contended that the damages for the taking of its drainage canal should include the amount which had been assessed as benefits accruing to other lands previously taken by the Government, which would thus no longer be subject to a charge for the maintenance of the remaining section of the canal.

Although it is difficult to see how in a condemnation action for the taking of the ditch alone the drainage district could procedurally seek damages which it claims it suffered because the Government had in other actions taken title to two thirds of the lands in the drainage district, thus removing such lands from the assessment rolls for further charges in maintaining the rest of the canal, we shall consider the case as though this claim could properly be made in this manner, as did the trial court and as do both parties here.

It is quite clear that whatever lands the United States took it took free of lien and it would be necessary for the

court to authorize the finding by the jury of a sufficient amount to discharge any lien that actually existed in favor of the district at the time of taking. We must therefore determine whether the Mississippi statute either created, or authorized the creation by the district of, a lien for the full amount of the benefits assessed or only for the amount necessary for the initial construction and the currently needed sums for maintenance.

The facts are not in dispute.

The United States instituted proceedings in January, 1952, to condemn the fee simple title to lands located in Yalobusha, Panola and Lafayette Counties, Mississippi, for use in the construction of the Enid Dam and Reservoir Project. The declaration of taking and complaint were filed, and for the purposes of this appeal, Tract No. 457 was taken, consisting of 126.5 acres and comprised of a drainage canal with connecting drainage works owned by the appellant. Along with the declaration of taking $1,265.00 was deposited in the registry of the court as the estimated just compensation for the tract. The district extends from the Yalobusha-Lafayette County lines in a northeasterly direction and constitutes the northeastern extremity of the lands condemned for the project. This district is part of a system of drainage canals and linked with other drainage districts below it. With the exception of 1,973.5 acres and two miles of the canal, both located in the eastern end of the district, the remaining 4,115.6 acres within the district were taken. The owners of this 4,115.6 acres were compensated for the market value of their lands taken.

Judgment on the declaration of taking was entered January 22, 1952, vesting fee simple title to the lands in question in the United States and authorizing immediate possession.

Appellant's answer set out that the drainage district was organized and functions under Chapter 197, Laws of Mississippi, 1912, and is by virtue of such laws a municipal corporation; that the County Board of Drainage Commissioners, as required by law, assessed $147,151.00 in benefits to acorue to the lands within the district by reason of the improvement to be made; that the assessment became a lien upon all of the lands in the district; that the drainage system in the district was constructed according to an approved plan for a total cost of $58,860.40 for which bonds were issued; that in accordance with assessment of benefits the district commissioners assessed the lands in the district for the years 1917 through 1941[1]; that the district has the power and is under obligation to assess the lands in the district for future necessary maintenance; that the unused assessed benefits on all lands in the district, including but not restricted to the lands previously taken, is $33,109.05; and that to defray expense it incurs in furnishing future drainage protection, it will be necessary to levy taxes based upon the assessed benefits accruing to all lands in the district, including those taken by the United States.

The appellant contends that by virtue of the alleged lien the district has an indefeasible estate in the lands which is property for which the United States must pay compensation in the amount of the unused assessed benefits, or, in the alternative, it should have the right to levy on the unused assessed benefits of all the lands in the district for maintenance of the drainage system when it becomes necessary.

Upon motion of the United States, the Court entered an order striking all of the appellant's answer except as

[1] This was to retire the outstanding bond issue in the amount of $58,860.40.

to its claim for compensation for the canal and its land taken by the United States in the district. The order stated that Yoknapatawpha Drainage District No. 2 has placed no specific lien on any of this land up to this time and that there is no specific lien on any of the land in said Drainage District because of any unused assessed benefits." We agree.

Chapter 197, Laws of Mississippi, 1912, is entitled in part, "AN ACT to create additional methods of organizing and maintaining drainage districts . . ." In conformity with Section 12 of the Act, prior to the organization of the drainage districts, the District Drainage Commissioners are to go upon the lands upon which the work of constructing the canal is proposed and determine: (1) the location of the proposed work; (2) the cost; (3) the land that will be injured or damaged by the proposed work and the aggregate amount to be sustained, and (4) "What lands will be benefited by the construction of the proposed work, and whether the aggregate amount of benefits will equal or exceed the cost of the construction of such work."

Section 20 of the Act provides that after organization of the drainage district "the said District Drainage Commissioners shall go upon the said lands and examine the same and apportion the cost of said proposed work upon the several tracts of land according to the benefits received [the assessment of benefits] by each from the said proposed work, . . . and shall also estimate and set down . . . the amount of the assessment against each tract of land and shall make and file a schedule or assessment roll of the same. . . ."

It is clear from this section that the assessment of benefits and assessments for the cost of the proposed

work are not one and the same, but the assessment of benefits accruing to each tract in the district from the construction of the drainage canals is used as a basis for apportioning to the various tracts within the district their proportionate share of the cost of the proposed work. Consequently the $147,151.00 figure here constitutes the total assessment of benefits accruing to all tracts within the district and was the basis for apportioning the cost of the proposed construction work, $58,860.40, to each tract.

Section 25 provides that upon confirmation of the assessment, the "County Board of Drainage Commissioners may order the assessments to be paid in installments, in such amount and at such times as will be convenient *for the accomplishment of the proposed work*; or may order the issuance of bonds for the total amount of said assessment . . ." (Emphasis supplied.) The section further provides that "said assessment or any bonds issued as herein provided shall be a lien upon the lands assessed, as other taxes, and such liens shall continue until such assessment is paid . . ." This section is clear in its provisions that it is the *assessments for the proposed work that shall be a lien.* Therefore, only the $58,860.40 figure constituted a lien upon the lands within the district and it is uncontroverted that this obligation has been discharged.[2] There is no provision that the assessment of benefits accruing to all lands within the District constitutes a lien. The court below was thus correct in determining that the unused assessed benefits in the sum of $33,109.05 did not constitute a lien upon the lands condemned by the United States.

[2] $860.00 of the bonds issued have not been retired, but these have not been presented for payment and the holders are unknown to the District. Funds for payment have been collected.

There is nothing in the cases cited[3] by appellant that conflicts with this construction of the Mississippi statute.

Appellant makes the further contention that even though the Court should hold that there was no lien on the land taken, nevertheless the District had an indefeasible interest and estate in such land for the taking of which it was entitled to compensation. Appellant relied on *United States v. Aho* (D.C. Ore.), 68 F. Supp. 358 and *United States v. Florea* (D.C. Ore.), 68 F. Supp. 367, in support of this contention. These cases were not appealed to the Court of Appeals for the Ninth Circuit, and if they are to be considered as authoritative they are nevertheless distinguishable from the case before us. There the court placed great stress on the statute of Oregon, which specifically provided that "all the lands and other real property within the district shall be and remain liable to be assessed for such payments . . ." and also stressed the fact that the lands there taken would continue to benefit even in the hands of the Government from the drainage canal operated by the district. The court in effect found in the Aho case that these facts created an indefeasible interest or estate in the lands and in the Florea case that they created a property interest which was taken by the Government. Although not stressed by the Government in the trial below or in its brief here, there is a further distinction, it seems to us, in that the claim for damages for the loss of the right to assess the taken property in the two Oregon cases was made in the condemnation proceedings as to the lands themselves; whereas here the District did not intervene in an effort to obtain its compensation when the 4,115.6

[3] Willis Creek Drainage District v. Yazoo County, (Sup. Ct. Miss., 1950) 48 So. 2d 498; Gillis v. Indian Creek Drainage District (Sup. Ct. Miss., 1929), 124 So. 262; and 134 So. 173 (1931); and Howie v. Panola-Quitman Drainage District (Sup. Ct. Miss., 1933), 151 So. 154.

acres of land were being taken but seeks to assert its claim in this proceeding. The vice of this procedural approach, it seems to us, is that the landowners in the earlier condemnation cases were paid the total value of their lands, benefited as they were by the drainage system; whereas if any claim existed against such lands for the continued maintenance of the drainage system the cost of such maintenance would properly be charged against the lands themselves and thus against the award to the owners rather than to the United States Government, which must now be deemed to have paid the full value of the lands, including the benefits of the drainage system.

In view of our conclusion that no lien existed on the land here being condemned and that no indefeasible interest or estate is being taken from the District in this proceeding, it follows that no future assessment can be levied on these lands now owned by the United States whether the levy be termed a local assessment, *Mullen Benevolent Corp. v. United States,* 1933, 290 U.S. 89, or may be deemed a tax, since it is established that property of the United States is immune from any form of state taxation. *United States v. Allegheny County,* 1944, 322 U.S. 174; *Mayo v. United States,* 1943, 319 U.S. 441, and *Jefferson County v. United States* (5 Cir.), 1947, 164 Fed. 2d 184.

At the trial to determine just compensation for the district lands taken, the court instructed the jury, after hearing testimony of the Government expert appraiser, that the 126.5 acres in the ditch had only a nominal value of from $1250.00 to $1500.00. The verdict returned was for $1400.00. This verdict was supported by the testimony of the only witness as to value.

The judgment must be AFFIRMED.

APPENDIX 4.

Petition for Rehearing.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
No. 16283
YOKNAPATAWPHA DRAINAGE DISTRICT NO. 2, LAFAYETTE COUNTY, MISSISSIPPI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

Comes Yoknapatawpha Drainage District No. 2, Lafayette County, Mississippi, Appellant in the above styled cause, and shows unto the Court that on April 2, 1957, this Court rendered judgment confirming a judgment rendered in the District Court of the United States for the Northern District of Mississippi.

On the original hearing herein Appellant contended as follows:

(1) That the assessment of benefits and damages, which assessment was made finally in 1917, was a lien upon all the lands in the District and that, while the United States took fee simple title in about two-thirds of the lands in the District, the United States took such title subject to such lien and should be required either to pay the total of the assessed benefits on such land taken by the United States or that there should be a judg-

ment stating that Appellant has the right in the future to levy taxes on such assessed benefits to secure funds for the repair and maintenance of said drainage canal in order to furnish drainage protection on the one-third of the lands not taken by the United States, as said District is required by law to do.

(2) Regardless of the first contention, Appellant had an indefeasible interest or right in said lands in said District taken by the United States.

(3) Just compensation required that Appellant should receive as the just measure of damages the estimated cost of necessary repairs and reconstruction to furnish drainage protection for the one-third of lands in the District not taken by the United States.

This Petition is having to be prepared hurriedly and we have not had sufficient time to prepare and print it properly, but this is an important matter concerning many landowners.

In referring to the various places in the Record or in the Original and Rebuttal Briefs of Appellant we shall refer to the Record citations as: (R). We shall refer to the Original Brief of Appellant as: (O.B.). We shall refer to the Rebuttal Brief of Appellant as: (R.B.).

In its Opinion this Court quotes Chapter 197, Section 25 of the Laws of Mississippi for 1912 and states that such provision of this statute as provides that the assessment of benefits shall be a lien upon the lands assessed and that such lien shall continue until such assessment is paid refers only to the assessments for the proposed construction. In the Opinion this Court also states:

"There is no provision that the assessment of benefits accruing to all lands within the District constitutes a lien."

The Opinion of the Court does not even refer to Chapter 197, Section 54, of the Laws of 1912, which is quoted in full at pages 45-46 of the Original Brief for Appellant. This last Section has nothing to do with construction costs, yet it contains this language referring to the assessment of benefits:

"... and a lien on all of the lands against which the assessment was made."

We respectfully submit that this statute clearly indicates and supports our contention that these assessed benefits are a lien on the land. If the quotation from Section 54, Chapter 197, does not mean that, what else can it mean?

In addition to that, Section 34, Chapter 197, of the Laws of 1912 (R.B. 44) provides for the repairing and maintaining of the drainage ditch and that taxes may be levied on the lands for that purpose. If the assessed benefits are not a lien, how can such taxes ever be determined and levied?

We most respectfully disagree with this Court that the cases we cite fail to uphold our contention.

The Court further says that the case of *United States vs. Ako*, (D.C.Ore. 1944), 68 F. Supp. 358, and *United States vs. Florea*, (D.C.Ore. 1945), 68 F. Supp. 367, do not support our contention that this District had an indefeasible interest and estate in such land for the taking of which the Drainage District was entitled to compensation. At page 7 of the Opinion this Court says, quite correctly, that the District Court of Oregon placed

great stress on the statute of Oregon, which specifically provided that:

> "All the lands and other real property within the district shall be and remain liable to be assessed for such payments."

Section 54, Chapter 197, Laws of Mississippi of 1912, makes substantially the same provision.

With reference to the statement in the Opinion of the Court to the effect that our claim should have been asserted in the condemnation proceedings as to the lands themselves, the United States proceeded in a different way and put the condemnation of these drainage canals in a separate condemnation suit. Appellant did claim, in the various suits which condemned the land itself, that it should have the assessed benefits on such pieces of land. (R. 22, O.B. 6).

The District Court refused such claims.

In its Opinion this Court states (p. 8) that the property of the United States is immune to any form of state taxation, and cites authorities. In the Rebuttal Brief for Appellant (R.B. 16-19) Judge Fee in *United States vs. Aho*, supra, shows plainly why the cited cases do not apply and it is plainly shown, and universally accepted, that assessments for public improvements such as those involved here are not taxes in the ordinary sense, and that therefore property taken by the United States is not immune from taxes levied on such assessed benefits previously made.

Finally, this Court says nothing specifically about the claim of Appellant for the estimated costs of future repair and construction of that part of the canal not taken

by the United States and discussed at length in our briefs (O.B. 51-63, R.B. 28-38). We respectfully submit that if the decision of this Court is that such claim of Appellant was not any part of such just compensation, this point should be made clearer so that such finding will be squarely before the Supreme Court of the United States.

Therefore, for the reasons above stated, Appellant moves the Court to set aside the Judgment of Affirmance rendered in this case and to render a judgment reversing the judgment of the District Court of the United States for the Northern District of Mississippi.

Respectfully submitted,

JAMES STONE & SONS
By Phil Stone
P. O. Box 269
Oxford, Mississippi
Attorneys for Appellant

CERTIFICATE

I, PHIL STONE, of Counsel for Appellant, do hereby certify that I have this day sent by United States mail, postage prepaid, to Mr. Perry W. Morton, Assistant Attorney General, Department of Justice, Washington, D. C., to Mr. Roger P. Marquis, Attorney, Department of Justice, Washington, D. C., to Miss Elizabeth Dudley, Attorney, Department of Justice, Washington, D. C., a true and correct copy of the foregoing Petition for Rehearing.

WITNESS my signature at Oxford, Mississippi, this April 30, 1957.

Phil Stone
Of Counsel for Appellant.

APPENDIX 5.

Order of Court Denying Petition for Rehearing

Office of the Clerk
UNITED STATES COURT OF APPEALS
Fifth Circuit
Edward W. Wadsworth, Clerk
New Orleans 6, La., May 23, 1957.

Mr. Phil Stone,
Attorney at law,
Oxford, Mississippi.

Dear Sir:

I beg to advise you that the Court today entered an order denying the Petition for the Rehearing in re—

No. 16,283—Yoknapatawpha Drainage District No. 2, Lafayette County, Mississippi, vs. United States of America.

No opinion was rendered in connection therewith.

Very truly yours,

/s/ Edward W. Wadsworth
Clerk

APPENDIX 6.

Laws of Mississippi 1912, Chapter 197, Section 24.

Assessments made final—appeals.

SEC. 24. If no objections shall be made to the assessment roll at the time appointed for the hearing of objections, the county board of drainage commissioners shall order the same to be approved and confirmed and filed, and the same shall stand as the final assessment upon the lands in said district. *Provided*, that any party feeling aggrieved may appeal from such assessment to the chancery court upon filing petition within ten days with the county board of drainage commissioners, but if no

petition for appeal is filed within ten days, said assessments shall be final and not objected to thereafter.

APPENDIX 7.

Laws of Mississippi, 1912, Chapter 197, Section 25.

Payment of assessments—bonds may be issued.

SEC. 25. At the time of confirming such assessment, the county board of drainage commissioners may order the assessments to be paid in installments, in such amount and at such times as will be convenient for the accomplishment of the proposed work; or may order the issuance of bonds for the total amount of said assessment; or may make the total amount of said assessment or any part thereof payable at a given date, and may issue the bonds for any balance. The assessment or any bonds ordered issued by the said county board of drainage commissioners, shall bear interest at a rate not exceeding six per cent per annum, and shall be non-taxable. But any owner of land in the district may pay the whole amount of the assessment and interest accrued, if any, against his land before it becomes due, or at any time thereafter, or any part of said assessment. *Provided,* such payment is made before any bonds are issued by the district. Said assessment or any bonds issued as herein provided shall be a lien upon the lands assessed, as other taxes, and such liens shall continue until such assessment is paid; and, in case any assessment or interest assessment on any bonds issued, is not paid at the time required for the payment of taxes as hereinafter provided, the land shall be sold the same as lands required by law to be sold to enforce the payment of State and county taxes.

APPENDIX 8.

Laws of Mississippi 1912, Chapter 197, Section 34.

Commissions to have full charge and supervision of drains.

SEC. 34. The district drainage commissioners, or the county board of drainage commissioners, in event there are no district drainage commissioners, may, with the approval of the county board of drainage commissioners, after the organization of the said district, do any and all acts that may be necessary in and about the surveying, laying out, constructing, repairing, altering, enlarging, cleaning, protecting, leveeing, and maintaining any drain or ditch or other work for which they have been appointed, and in the event it shall be necessary they may annually see that any drains constructed or improved under this Chapter, in their district, may be cleaned out and all obstructions, brush, willow, or other growth, or drift or logs, shall be cleaned out and said ditches or drains be kept in good repair so as to substantially drain said land, and they may annually, before the first day of August, request the board of supervisors with the approval of the county board of drainage commissioners, to levy an additional tax on the lands in the said drainage district for the purpose of keeping said ditches in repair as provided by this Section, and the board of supervisors shall, at the time of levying of other taxes, levy said tax as provided herein, which shall be collected at the time and in the manner hereinbefore provided for the collection of other drainage tax.

APPENDIX 9.

Laws of Mississippi, 1912, Chapter 197, Section 46.

If assessment deficient commission may ask bond issue.

SEC. 46. In the event that the assessment of any dis-

trict operating under the provisions of this Act shall be insufficient to complete the work, the district drainage commissioners of the district may petition the county board of drainage commissioners to issue the bonds of said district for an amount sufficient to complete the work of said drainage district, and the county board of drainage commissioners shall issue the bonds of said district as prayed for in said petition, and any bonds issued for such purpose shall be issued and assessment made on the lands and shall be payable in like manner and shall be a lien on the lands of said district in the same manner as provided for hereinbefore for bonds issued under the provisions of this Act. *Provided*, said bonds shall not be issued until the county board of drainage commissioners shall publish notice for two weeks of their intention to issue said bonds, and if no objection is made to the issuance of said bonds, the bonds thus issued shall be incontestable unless appeal is taken to the chancery court, as hereinafter provided.

APPENDIX 10.

Laws of Mississippi, 1912, Chapter 197, Section 54.

How Act to be construed—judgment of commission to be conclusive.

SEC. 54. This Act shall be liberally construed to promote the ditching, drainage and reclamation of wet, swampy and overflowed lands, and the collection of assessments shall not be defeated by reason of any omission, imperfection, or defect in the organization of any district, or in any proceedings occurring prior to the judgment of the county board of drainage commissioners confirming assessments of benefits and damages; but said judgment shall be conclusive that all prior proceedings were regular and according to law and no provision

of this Act in regard to notice shall be held to be mandatory except the notice of the time of the hearing of the application to confirm the assessments, and after the order confirming the same any party interested, either land o ners or commissioners, may appeal to the chancery court within ten days after the date of said order, and after ten days have elapsed the said assessment shall be final, and a lien on all of the lands against which the assessment was made. If an appeal is taken to the chancery court the chancellor shall hear the same in term time or vacation, at such time as he may designate, and any party feeling aggrieved may appeal to the supreme court in such manner and within such time as the chancellor may, by order, provide, but the chancellor shall not grant any party interested more than thirty days to appeal to the supreme court.

CERTIFICATE

I, Phil Stone, of the firm of JAMES STONE & SONS, Oxford, Mississippi, Attorneys for Petitioner, do hereby certify that I have this day delivered personally three copies of the foregoing Petition and Brief to Honorable Thomas R. Ethridge, United States Attorney for the Northern District of Mississippi.

I further certify that I have this day mailed, air mail postage prepaid, three copies of the foregoing Petition and Brief to Honorable Herbert Brownell, Attorney General of the United States, at his usual post office address, Department of Justice, Washington, D. C.; and that I have this day mailed, air mail postage prepaid, three copies of the foregoing Petition and Brief to Miss Elizabeth Dudley, at her usual post office address, Room 2334, Department of Justice, Washington 25, D. C., she being an Assistant to the Attorney General.

This September _____, 1957.

Phil Stone
P. O. Box 269
Oxford, Mississippi
Of Counsel for Petitioner.